

Telecommunications Licensing Regime: A New Method of State Control After Privatisation of Telecommunications

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Abstract: Telecommunications is one sector historically subject to state monopolies in both developed and developing countries for many reasons. The Indonesian legislation stipulates that the telecommunications sector is of national strategic importance and must therefore be controlled by the state. Not surprisingly, the Indonesian government has tended to read the term “state control” as state or government ownership. Since the late 1980s, there has been a radical policy reversal whereby governments have progressively reduced their ownership and involvement in this sector by increasing private sector participation. One of the most important consequences of this is that privatization has led governments no longer being able to play traditional tripartite roles of owner, operator and regulator of telecommunications. More specifically it raises a critical question; in what ways might the government maintain its control over the sector when privatization reduces state ownership in SOEs? This paper argues that licensing is a legal tool to maintain state control after privatization of telecommunications. It can be used as a tool to implement important national priorities, be it opening the markets for equipment, services, and networks to immediate or gradual competition, or to preserve a monopoly for the time being so as to permit investors to recoup their expenditures or to continue a source of revenue for the government.

1. Introduction

A telecommunications license authorises an entity to provide telecommunications services or operate telecommunications facilities. Licenses do not have the same importance in all countries. In a few countries where monopoly telecommunications operators have long been privately owned, notably Canada and the US, there have traditionally not been telecommunications licenses. Instead, regulatory terms and conditions were imposed through decisions, orders or traffic-approval processes of a government regulatory authority. In some other countries, including Latin American countries, privately operated telecommunications carriers were traditionally granted concessions or a franchise.

This paper examines the concept of the license particularly its relevance with state control after privatisation. The paper begins by providing a brief discussion on the privatisation of telecommunications and more specifically on the methods of state control after privatisation. Subsequently, the paper reviews the concept of a license including its objectives and type of licensing regime. To obtain an empirical understanding, the application of the licensing system in Malaysia and the UK are subject to special scrutiny. Finally, the paper examines the present Indonesian licensing regime and this is followed by an analysis of the relation between a license and state control, and also suggestions are considered for the future Indonesian licensing regime.

2. Privatisation of Telecommunications

Privatisation and telecommunications industry have been interacting since the 1980s and state control in the sense of government involvement in the sector has been a central issue. Telecommunications is one sector historically subject to state monopolies in both developed and developing countries for many reasons. The Indonesian legislation stipulates that the telecommunications sector is of national strategic

importance and must therefore be controlled by the state.¹ Not surprisingly, the Indonesian government has tended to read the term “state control” as state or government ownership.

For the Indonesian context, privatisation has certain implications to the meaning of “state control” under the Indonesian Constitution.² In its development “state control” has become a controversial term as it has been subjected to different approaches and applications. This is more complicated in relation to the concept of privatisation. On the one hand, privatisation entails changing the nature of state intervention or control in the economy. On the other hand, the concept of “state control” indicates a constitutional justification of state intervention in the economy. Both of these interpretations are inter-related and also opposite in nature.

In the telecommunications sector, privatization has been as policy response to the shortcomings and the failures of the statist traditional telecommunications regime in providing services efficiently and in adjusting to rapid technological advances in telecommunications. Privatization is both a political and a legal tool, which mainly aims at paradigm shift in the telecommunications operations from state monopoly to competition (multi-operator systems). One of the most important consequences of this is that privatization has led governments no longer being able to play traditional tripartite roles of owner, operator and regulator of telecommunications. The international experience shows that in the wake of privatization, governments play more prominent roles only as policy makers and regulators. Privatization therefore emphasizes the state’s regulatory function.

Regarding the methods of state control after privatisation of telecommunications, this paper has found that in both the international and Indonesian context, governments introduce new methods of control to ensure that all markets (operators) are treated fairly and equally. These methods include the creation of golden shares, the establishment of an independent regulatory body and the introduction of new licensing regimes. Together, these aim to reduce monopoly and enhance competition. In summary, by privatisation, there has been a paradigm shift of the state’s control from ownership to regulatory based-control. This paper will specifically discuss licensing as a method of state control after privatisation of telecommunications with specific reference to Indonesia, Malaysia, and the UK.

3. The Concept of License

3.1. Defining the Term “License”

The term “license” comes from the Latin *licere*, meaning to permit.³ This term refers to a set of rights and obligations granted to an entity on the basis of national or state legislation or pursuant to a regulatory rule or decree. A license does not establish any kind of commercial arrangement between the licensed entity and the government. Instead, the granting and enforcement of a license is generally a matter of public or administrative law, no matter which government entity is tasked with granting the license.⁴ The term “permit” is also often used to describe what essentially a license in a few countries, particularly in South America and Central America.⁵ In the telecommunications sector, a license authorises an entity to provide telecommunications services or operate telecommunications facilities. Licenses also generally define the terms and conditions of such authorisation, and describe the major rights and obligations of a telecommunications operator.⁶

In contrast to a license, a “concession” or “franchise” generally refers to a commercial agreement established between the host government (in the case of a concession), or the state-owned monopoly (in the case of a franchise), and a private entity for the construction and operation of some form of infrastructure. In the context of telecommunications, these arrangements can take a number of forms. For

¹ Article 4 (1) of the Telecommunications Act of 1999.

² Article 33 (2) of the Indonesian Constitution of 1945 states: “Sectors of production that are important for the country and affect the life of the people shall be controlled by the state”.

³ Anne Flanagan (2005), “Authorization and Licensing” in Ian Walden and John Angel (eds.), *Telecommunications Law and Regulation*, Oxford University Press, Oxford, p 155.

⁴ Dale N. Hatfield and Eric Lie (2005), “Options for Telecommunications Licensing” in ITU, *Trends in Telecommunications Reform 2004/2005: Licensing in An Era of Convergence*, Geneva, p 37.

⁵ *Ibid.*

⁶ Hank Intven (2000), *Telecommunications Regulation Handbook, Module 2: Licensing Telecommunications Services*, The World Bank, Washington, D.C., p 2.

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example, concession or franchise holders may build a telecommunications network in exchange for the government-granted right to operate that network, or for a share in its revenue. Examples of such arrangements include BOT (build-operate-transfer), BTO (build-transfer-operate) and BOO (build-operate-own) arrangements⁷

Today, concessions and franchises which were largely based on the principle of exclusivity and on the need for significant government involvement and planning have been abandoned, as telecommunications markets have been liberalised. They are widely seen now as incompatible with the principles of open competition and market diversity. Instead, they have been largely replaced by open and transparent licensing regimes, supplemented by government subsidies where private-sector investment is inadequate.⁸

The terms “license”, “concession” and “franchise” may be defined differently in the laws of different countries. However, these terms generally refer to the same basic concept. In the context of telecommunications regulation, they all refer to a legal document granted or approved by a regulator or other government authority that defines the rights and obligations of a telecommunications service provider or network operator.⁹ In other words, a license is a legal instrument that enables governments to control both entry into the telecommunications market and the behaviour of the license-holder once they enter the market.

Historically, state-owned incumbent operators provided telecommunications services on a monopoly basis in most communities. Telecommunications operations were treated as a branch of the public administration, along with postal services, and licenses were not considered necessary. In this context, the concept of a license represents a paradigm shift of state control over the telecommunications sector from direct to indirect state control – from state ownership to state-control based regulation.

3.2. Licensing Objectives

Countries have different objectives for licensing telecommunications operators. They use the licensing process to exercise control over many variables. These include market structure, the number and type of network operators or service providers, the extent of competition, the pace of infrastructure expansion and the affordability and range of telecommunications services available to consumers. It is no surprise, given how useful a tool licensing is, many governments have used it to pursue a wide range of policy objectives.¹⁰ Some of the common licensing objectives are outlined below.

3.2.1. The Allocation of Limited Resources

Limited resources such as radio spectrum and telephone numbers are required in the operation of a telecommunications service. Due to the finite nature of such resources, governments must allocate them between operators in a fair, efficient and transparent manner. Licensing is the most common regulatory means to allocate these resources. Regulators may choose from a wide range of licensing award mechanism including auctions, comparative evaluations of competing bids (often known as “beauty contest”) and “first come, first served” approaches.¹¹

3.2.2. Regulatory Certainty

Licensing is one element of the regulatory framework. Other rules that govern operator behaviour are included in telecommunications laws, sector policies, decisions, guidelines, directions and other documents of general application. But where privatisation and competition are introduced before a complete regulatory framework can be developed, the rights and obligations of operators are often defined in licences for the sake of providing regulatory certainty. By clearly defining the rights and obligations of the operators, a license can significantly increase confidence in the regulatory regime. Regulatory certainty is a critical element of the privatisation process, in which governments aim to attract

⁷ Hatfield and Lie, *supra* note 4, p 37.

⁸ *Ibid.*

⁹ Hank Intven and Theresa Meidema (2002), “Specific Regulatory Functions” in ITU, *Trends in Telecommunications Reform 2002: Effective Regulation*, Geneva, p 55.

¹⁰ See also Walden and Angel, *supra* note 3, pp 160-165.

¹¹ For detailed discussion about these mechanisms see Hatfield and Lie, *supra* note 4, pp 51-6.

new operators and capital investment. This is particularly true when foreign investment is sought in riskier developing or transitional economies.¹²

3.2.3 Generating Government Revenue

Licensing of telecommunications operators can provide significant revenues to governments. An auction for new licences can generate one-time revenues. For instance, the 3G auctions in 2004 in the UK netted the government about US\$ 35 billion in revenues, while the auction in Germany generated US\$ 46 billion.¹³ Annual licence fees also provide a continuing source of revenue to fund the operation of the regulator, or for other purposes.¹⁴

3.2.4. Privatisation or Commercialisation

In some countries such as in the UK, previously state-owned incumbents are given licences for the first time when they are privatised. Governments lose a measure of control over incumbents during the privatisation process. Licences are seen as a way to clarify for all stakeholders including consumers, competitors and the government itself, what the privatised incumbent can and cannot do. At the same time, this gives new investors some certainty about the business in which they are investing.¹⁵ The incumbent's new license is generally meant to reflect a new telecommunications policy and regulatory regime, driven by a market-based economy and focusing on attracting competitive market entry. For example, some governments have included interconnection and network access requirements in their incumbents' licences.¹⁶

3.2.5. Expansion of Networks and Services

Most governments view basic telecommunications as an essential public service. While there has been a trend towards privatisation and increasing reliance on markets to deliver services, most regulators continue to impose some obligations to ensure that basic telecommunications services are available to the public at affordable rates.¹⁷ The objective of network expansion and promoting universal access to telecommunications are major reasons for licensing new telecommunications operators in both developed and developing countries. Network roll-out and service coverage obligations are often included in licenses. This is particularly common when state-owned incumbent operators are privatised, or when licenses confer some degree of exclusivity (e.g. a duopoly cellular license, with a right to use scarce spectrum).¹⁸

3.2.6. Consumer Protection

Consumer protection provisions are often included in telecommunications licenses, alongside other terms and conditions related to the provision of services and facilities. These conditions may relate to matters such as price regulation, quality of service standards, and mandatory services that must be offered to consumers. These include, for example, directory services, operator assistance and emergency services.¹⁹

3.2.7. Regulating Market Structure

A key aspect of regulation is determining what should be the ideal or optimal structure of the telecommunications market being regulated. Many countries seek to fix the number of operators they license to provide telecommunications services. A prime reason for licensing new telecommunications

¹² Intven, supra note 6, p 4.

¹³ Hatfield and Lie, supra note 4, p 27.

¹⁴ Licensing of new operators can increase the overall size of telecommunications markets and thus generate higher tax revenues for governments.

¹⁵ Hatfield and Lie, supra note 4, p 25.

¹⁶ Ibid. p 26.

¹⁷ See also Walden and Angel, supra note 3, p 163.

¹⁸ Intven, supra note 6, p 2.

¹⁹ Ibid. p 4.

operators is to increase competition. In many countries, one of the major objectives of the licensing process is to ensure the viability and benefits of new competitive entry. On the other hand, while licensing initiatives can increase competition, licensing requirements can also provide a means to limit market access. This is the objective of licensing authorities in some countries, where licenses have granted or retained monopoly, duopoly or other exclusive rights. Such rights are often retained for political or financial reasons.²⁰

3.3. Types of Licensing Regimes

Countries use different approaches to authorizing telecommunications operators and services. However, three broad categories of licensing regimes are employed in most countries. These are: individual licenses, general authorization or class license and open entry (no licensing requirements) as shown in table 8.1.

Table 8.1 Main Types of Licensing Approaches

Type of licensing requirement	Main features	Examples
Individual licenses (Operator-specific licenses)	<ul style="list-style-type: none"> - Issued to a single named service provider - Usually a customized and detailed license - Often contains detailed conditions - Frequently granted through some form of competitive selection process - Useful where: <ul style="list-style-type: none"> > A scarce resource or right is to be licensed (e.g. spectrum) and/or > The regulator has a significant interests in ensuring that the service is provided in a particular manner (e.g. where the operator has significant market power) 	<ul style="list-style-type: none"> - Basic PSTN services in a monopoly market - Mobile Wireless services - Any service requiring spectrum
General Authorizations (Class License)	<ul style="list-style-type: none"> - Useful where individual licenses are not justified, but where there are significant regulatory objectives which can be achieved by establishing general conditions - Normally sets out basic rights and obligations and regulatory provisions of general application to the class of services licensed - Normally issued without a competitive selection process; all qualified entities are authorized to provide services or operate facilities. 	<ul style="list-style-type: none"> - Data transmission services - Resale services - Private networks - International services - VSATs - All electronics communications services, which include basic voice and value-added services (in the European Union)
Services provided without a license (Fully liberalized services)	<ul style="list-style-type: none"> - No licensing process or qualification requirements, beyond rules generally applicable to the ICT sector - Registration requirements or other rules of general application are sometimes imposed by regulations 	<ul style="list-style-type: none"> - Internet service providers (ISPs) - Value-added services - WLAN hotspots - Tele-kiosks

Source: ITU (2005): p 39

* PSTN: Public Switched Telephone Network

* WLAN: Wireless Local Area Network

²⁰ Hatfield and Lie, supra note 4, p 26. See also Walden and Angel, supra note 3, p 161.

These categories are not mutually exclusive, and many countries have employed more than one licensing type within the same licensing regime. Indeed, one or more of these licensing types are reflected in virtually every contemporary licensing system.²¹

An individual license is a license granted to an operator to provide certain telecommunications services. Traditionally, an individual license has been required when telecommunications markets are not fully competitive or where a comprehensive regulatory and consumer protection framework is not yet established. In these circumstances, individual licenses may help to gradually liberalise the market by opening up only certain market segments, for instance mobile cellular. In many developed telecommunications markets today, individual licenses are still used in situations where spectrum or other scarce resources are involved. In addition, regulators employ individual licenses to limit the number of entrants into a market or to control the structure and the functioning of that market.²²

Individual licences spell out detailed and customised obligations and conditions. In most countries, applicants must file applications to receive individual licenses. They usually are required to submit information and documentation pertaining to the identity of the applicant, the details of the services or facilities it intends to provide, business plans and the financial viability and technical experience of the applicant. Submitting an application typically requires the payment of an administrative fee for processing.²³

Requiring individual licenses for every provider seeking market entry may demand a significant level of involvement of the government or other licensing authorities. Prospective investors may even be reluctant to invest due to restrictive and burdensome licensing rules. As a response, licensing authorities in most countries have moved towards greater use of general authorisations or class licenses to regulate the market entry of providers for certain classes of services and facilities. General authorisations and class licenses are administratively simple approaches. Under this approach, the licensing authority publishes a set of eligibility criteria and general conditions. Any entity that meets the criteria is automatically authorised to provide the designated service or facility without any further regulatory processing.²⁴

In practice, many licensing authorities have adopted both individual and class licensing approaches in combination. Recent developments, however, have led to a gradual progression towards greater use of general authorisation and class licensing, as regulatory frameworks have become more established telecommunications markets become more open to competition.²⁵

4. International Experience

4.1. Malaysia

4.1.1. Individual and Class Licenses

Malaysian government enacted the Communications and Multimedia Act 1998 (CMA 1998) to cater for the convergence era of telecommunications, broadcasting and information technology. This Act changed the definition of these distinct industries into the communications and multimedia industry. One of the main reasons behind this was the contention on the part of the government that to differentiate these three industries would do more harm than good due to the fact technological advances no longer make it viable to draw the line differentiating them.²⁶

With regard to the licensing system, the CMA 1998 formulated this as a technology neutral based licensing regime.²⁷ There are two types of licenses: individual and class licenses. An individual license is

²¹ ITU (2005), *supra* note 4, p 38.

²² *Ibid.* pp 38-9.

²³ *Ibid.*

²⁴ Intven and Meidema, *supra* note 9, pp 57-58

²⁵ *Ibid.*

²⁶ Safinaz Mohd.Hussein (2003), "Service :Licensing System in the Malaysian Communications and Multimedia Industry", presented at the 18th BILET Conference : Controlling Information in the Online Environment, April, London, p 1

²⁷ Available at <http://www.cmc.gov.my/>. Last visited at 10 August 2012.

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granted to a person who conducts an activity which requires a high degree of regulatory control.²⁸ Section 6 of the CMA 1998 defines an individual license as *a license for a specified person to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject*. Section 27 (1) further provides that a person who wants to operate under an individual license may apply in writing to the Malaysian Communications and Multimedia Commission (MCMC) and this Commission shall make recommendations to the Minister within sixty days of receiving the application whether or not that person should be granted an individual license.²⁹ These provisions merely provide the procedures for an application of an individual license. They do not however, make clear the differences between an individual license and a class license.

Examples of local companies holding individual licenses are *DiGi Telecommunications, Telekom Malaysia Bhd., Celcom and Maxis International*. These companies have each been granted three types of individual licenses, i.e. network facility individual license, network service individual license and applications service individual license. They provide services like earth stations, fixed links and cables, public payphones facilities, radio communications transmitters and links, satellite hubs, towers, cellular mobile services and IP telephony.³⁰

The class license is a type of license introduced into the industry by the CMA 1998 to cater for the needs of small operators. It has a lighter form of regulatory control and minimal procedural requirements. In a class license, the minister sets out the rights and obligations that apply *generally to persons engaged in a particular activity*. Section 6 defines a class license as *a license for any or all persons to conduct specified activity and may include conditions to which the conduct of that activity shall be subject*.³¹ Section 131 further provides that a person shall not operate under a class license in respect of any network facilities, network or applications service unless registered by the MCMC.³²

The Minister may grant a class license in respect of any activity requiring a license under the CMA 1998 and a person who falls within a class license that has been granted by the Minister under section 44 (1) may operate an activity by submitting a registration notice to the MCMC.³³ This simply means that a Minister will grant class licences and lists what services fall under these different types of class licenses. An operator therefore needs to check whether the type of service it intends to provide falls under any of the services listed by the Minister. If the service is not listed in the determination then the operator needs to apply for an individual license for that same activity. The Communications and Multimedia Regulations 2000 restrict a foreign individual who is not a permanent resident and foreign company from registering a class license.³⁴ Examples of local companies who are a registered class licensee are *Information Network Services, Time dotNet Bhd., and Maxis Mobile Sdn Bhd*. These companies hold applications service class licenses for Internet access, messaging and directory services.³⁵

4.1.2. Licensable Activities

Within the two-abovementioned licenses types, there are four licensable activities. A person who wishes to provide a service to the industry must provide services that fall within these four categories, i.e. *Network Facilities Providers (NFP), Network Service Providers (NSP), Applications Services Providers (ASP) and Content Application Service Providers (CASP)*.³⁶

A network facility is an activity which provides facilities or infrastructure to the industry upon which network, applications and content applications services depend, for example earth stations, broadband fibre optic cables, telecommunications lines and exchanges, radio communications transmission equipment. Network services are services that provide basic connectivity and bandwidth to support a variety of applications services for example broadcasting distribution services, mobile services, customer

²⁸ Malaysian Communications and Multimedia Commission/MCMC (1999), "Licensing Requirements under the CMA 1998", An Information Paper, August, p 2.

²⁹ Section 27 and 29 of the CMA 1998.

³⁰ Hussein, *supra* note 26, p 3.

³¹ Section 6 of the CMA 1998

³² Section 131 of the CMA 1998.

³³ Section 45 (1) of the CMA 1998.

³⁴ See Regulation 23 of the Communications and Multimedia Regulation 2000.

³⁵ Available at <http://www.cmc.my/>. Last visited at 10 August 2012.

³⁶ May Fong Cheong (2011), "State Relations in the Telecommunications Industry in Malaysia", *Macquarie Journal of Business Law*, Vol. 8, p. 287.

access services and mobile satellite services.³⁷ In other words, network services enable connectivity or transport just like a car on the road.³⁸

Applications Services on the other hand provide particular functions or capabilities delivered to end-users such as voice services, data services, electronic commerce and other transmission services.³⁹ Lastly, Content Applications Services provide a type of applications service, which contains content. In other words, it is a subset of applications service. Examples of content applications services are traditional broadcasting, online publishing and information services.⁴⁰ Section 205 of the CMA 1998 prohibits a person from providing a content applications service unless with an individual or class license.

4.1.3. Matters to be considered in Determining Licensing Requirements

The process and matters to be considered by a person wishing to apply for a license under the CMA 1998 is twofold. First, the person has to identify the activity that he/she is providing. In other words, he/she has to ensure that this service is one of the four categories of licensable activities, i.e. network facility, network service, applications or content applications. Secondly, he/she has to determine the type of license required, i.e. individual or class.⁴¹

It is important to note that the Malaysian Telecommunications Licensing regime is based on the government's contention that it is no longer viable to categorize the licenses according to the technology used but rather by the activity the provider seeks to provide. This is to ensure that it does not go out of date when new technology is used to provide the same service and it also shows the character of the CMA 1998 that stresses longevity.⁴²

4.2. United Kingdom

4.2.1. Old Licensing Regime

The Telecommunications Act 1984 makes it criminal offence to run a telecommunications system in the UK, or to make a connection to another system without a license.⁴³ Each license sets out what services a company can provide and what systems it can run, and attaches conditions with which operators must comply. The Department of Trade and Industry (DTI) is responsible for the granting of licenses, the OFTEL for their enforcement once issued.⁴⁴ There were two main categories of license granted: (i) class licenses or general authorisations, which cover a group or class of users, and cover most of the telecommunications systems run in the UK, and (ii) individual licenses, which are issued to individual companies.⁴⁵

4.2.1.1. Class Licenses

Class licenses are general authorisations, which permit the operation of a wide range of telecommunications systems from an ordinary telephone handset to an office network. In total, there were 19 Class Licenses in the UK. The main class licenses included:⁴⁶

- **Self-Provision License (SPL).** It covered telecommunications systems run for self-use, i.e. where services were not offered to third parties. The types of systems that were run under the SPL included in-house call centres and private networks of companies such as banks, supermarkets or service stations.

³⁷ MCMC, *supra* note 28, p 4.

³⁸ Hussein, *supra* note 26, p 4.

³⁹ Available at <http://www.cmc.my/>. Last visited at 10 August 2012.

⁴⁰ *Ibid.*

⁴¹ MCMC, *supra* note 28, p 4.

⁴² Hussein, *supra* note 26, p 6.

⁴³ Section 5 of the Telecommunications Act 1984

⁴⁴ Section 7 (1) (a) of the Telecommunications Act 1984.

⁴⁵ *Ibid.* Section 7 (3)

⁴⁶ OECD (2002), "Regulatory Reform in UK", OECD, pp 24-6.

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- **Telecommunications Services License (TSL).** It was a license, which permits any person to provide third parties with a wide range of telecommunications services. Types of systems that run under the TSL included: hotels, internet service providers, national voice resellers and companies that provide telecommunications services to other persons on their premises including private payphones.
- **Private Mobile Radio class license (PMR).** This license permitted a narrow range of mobile services, including the provision of automatic vehicle location systems, running PMR systems from a single base station such as taxi firms

4.2.1.2. *Individual Licenses*

A company proposing to run a system for the provision of services falling outside the various class licenses, for example, rolling out transmission infrastructure (copper wire, fibre or radio) comprising apparatus situated in and linking up to more than 20 separate sets of premises, running a mobile telecommunications network with more than one base station, running international facilities, etc., it needed to apply for an individual license. The main type of individual license was the Public Telecommunications Operator (PTO) license.⁴⁷

4.2.2. **New Licensing Regime**

The present UK licensing regime is based on both the European Union Licensing Directive (Directive), which moved from licenses to “authorisation” and the Communications Act 2003, which transferred granting of licenses from DTI to the new Regulator (OFCOM).

The Act governs, among others, the provision of electronic communications networks and services.⁴⁸ It is lengthy and complex but puts in place the general authorisation scheme requirement of the Directive by:

- (i) repealing those provisions of the Telecommunications Act 1984 governing the powers and requirements for licenses, the provisions for their modification and enforcement, as well as those regarding designations of public telecommunications operators and governing the rights to access public and private land associated with that designation;⁴⁹ and
- (ii) putting in place powers for OFCOM to set certain general and specific conditions on specified persons providing electronic communications networks and services.⁵⁰

The Communications Act 2003 requires that a person not provide a designated electronic communications network or service without advance notification to OFCOM, the regulatory agency of his intent to do so.⁵¹ It also requires that any person “making available a designated associated facility” similarly notify its intent to OFCOM. The Act also requires that OFCOM create a public register of notifying providers, and makes possible sanctions for failure to notify.⁵²

The present UK’s licensing regime appears to be based on general authorisation or class licensing and removed the conditions as stipulated in an individual license. It can be seen for instance that the Communications Act 2003 provides only a set of general conditions that should be fulfilled by entities applying for the provision of electronic communications networks and services. These mainly pertain to consumer protection, access and interconnection, essential requirements, universal service-related and scarce resources.⁵³ Any entity that meets the criteria is authorised to provide the designated service or facility without any further regulatory processing. However, it does not apply to the right to use spectrum. The use of spectrum is regulated under the Wireless Telegraph Acts⁵⁴. All persons must be licensed under these acts to install and or use radio equipment. The Communications Act 2003 did not make major

⁴⁷ Ibid. p 27.

⁴⁸ Part 2, Chapter 1 of the Communications Act 2003.

⁴⁹ Section 147 of the Communications Act 2003

⁵⁰ Ibid. Sections 45 and 46

⁵¹ Ibid. Sections 33 (1)(2).

⁵² Ibid. Sections 35-7

⁵³ Ibid. Section 45

⁵⁴ Wireless Telegraphy Acts 1949, 1967 and 1998.

changes to this regime but rather some adjustments to bring it into conformity with the new European Union Framework and the new UK regulatory structure.⁵⁵

5. The Indonesian Licensing Regime

The Telecommunications Act 1999 provided the two main provisions regarding licensing. First, telecommunications operations that consist of a network operation, service operation and special telecommunications operation are carried out after obtaining a license from the Minister (Ministry of Communications and Information).⁵⁶ Secondly, the license shall be granted with due observance of simple procedures, a transparent, fair and non-discriminative process as well as completion within a short time.⁵⁷ These provisions are elaborated further through the government regulations and the ministerial decree.

5.1. Licensing Authority

The principal licensing authority is the Ministry of Communications and Information), which has an authority to grant licenses to entities that run telecommunications networks and services operations.⁵⁸ However, for certain services such multimedia, the license is granted by the Directorate General of Post and Telecommunications (DGPT), and now, it is become the Directorate General of Post and Communication (DGPC).⁵⁹ This raises problems following the establishment of the Indonesian Telecommunications Regulatory Body (BRTI), in which the chairman is the DGPC. BRTI consists of DGPC and the Regulatory Committee which consists of 9 members. The question is, can DGPC issue a license on the operation of multimedia services without any consideration from the Regulatory Committee? The author argues that the DGPC can issue the license independent of the regulatory Committee, as the DGPC is a unit within the Ministry of Communications and Information, which itself has an authority to issue the specific license. This complication reflects the transitional telecommunications regulatory framework in Indonesia in which the government seems to be gradually reducing a direct control over the telecommunications sector.

5.2. License Categories

There are three different license categories: licenses for network operations, licenses for service operation and no licensing requirements. The first category is a license granted to entities that run network operations. Four types of entities can apply for this license. These are: state-owned enterprises (SOEs), region-owned enterprises, private business enterprises and cooperatives. These entities are permitted to run certain network operations such as fixed telephone networks and mobile networks.⁶⁰ This license spells out detailed and customised obligations and conditions. These include consumer protection, providing standard quality of services and providing universal service obligations.⁶¹ This category seems to be similar to the individual license as applied in Malaysia.

The second category is a license granted to entities that run telecommunications services, which include domestic and long distance services, international services, call center and Internet access.⁶² In other words, this is a service operation license. This category is not similar to class licenses or general authorisation as applied in both Malaysia and UK, because an entity should obtain a license before running telecommunications services operation. In addition, as with the first category, this license spells out certain obligations that include providing equal services to consumer, providing terms and conditions for subscribe and ensuring for standard service quality.⁶³

⁵⁵ Walden and Angel, *supra* note 3, p 204.

⁵⁶ Article 11 (1) of the Indonesian Telecommunications Act 1999.

⁵⁷ *Ibid.* Article 11 (2)

⁵⁸ Article 2 of the Decree of the Ministry of Transportation of the Republic of Indonesia No. KM. 20/2001 and Article 2 of the Decree of the Ministry of Transportation No. KM. 21/2001.

⁵⁹ Article 46 of the Decree of the Ministry of Transportation No. KM. 21/2001.

⁶⁰ Article 2 and 3 of the Decree of the Ministry of Transportation No. KM 20/2001.

⁶¹ Articles 7-13.

⁶² Articles 3 and 4 of the Decree of the Ministry of Transportation No. KM 21/2001.

⁶³ Articles 7-13 of the Decree of the Ministry of Transportation No. KM 21/2001.

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The third category is an open entry. Under this category any entity that meets the criteria is automatically authorised to provide the designated service without any further regulatory processing. Under this approach, the licensing authority publishes a set of eligibility criteria and general conditions. This category of license is only applicable to multimedia service operation such as Internet set-voice provider, wireless access protocol and small office home office.⁶⁴

5.3. The Licensing Process

There are two steps in obtaining a license for telecommunications operation, the principle license and the operation license. This provision does not apply to telecommunications operations for defence and security purposes.⁶⁵ The principle license is a license that allows an entity to undertake telecommunications operations. However, this license does not permit the entity to run either network or service telecommunications operation until the Ministry grants the operation license. An entity that is eligible to obtain the principle license should meet the following conditions: (i) an Indonesian business entity that operates in the telecommunications sector, and (ii) has sufficient financial and human resources in the telecommunications sector.⁶⁶

6. Licensing as the State Control Mechanism

The foregoing discussion reveals that licensing is a key aspect of telecommunications regulation. At a basic level, a licence permits a telecommunications provider to provide specified equipment, networks, and/or services, and often conditions that permission on certain requirements. Licensing, however, can control market entry and, therefore, can be used to shape the market by limiting the number of players or the types of services that they are able to provide. It can create legal certainty for new entrants in markets where the telecommunications regulatory regime or general legal framework is not comprehensive or where there is not much history with telecommunications regulation. Under these circumstances, conditions imposed and rights accorded in licence can serve as a substitute for such frameworks.⁶⁷

As a binding contract, a license can guarantee exclusivity or ensure due process as well as impose performance obligations, e.g. in the form of enhanced market penetration or network roll-out requirements. Without the performance obligations, countries might be unwilling to involve private parties in the running of the state-owned incumbent. Licensing can also be used as a tool to create competitive markets by imposing obligations on incumbents in order to level the playing field.⁶⁸

Licensing is a relatively recent development in many telecommunications markets. Historically, state-owned incumbent operators provided telecommunications services on a monopoly basis in most markets. Telecommunications operations were treated as a branch of the public administration, along with postal services, and licenses were not considered necessary. Under a monopoly regime, an SOE represents a form of direct state control over the telecommunications operation. Whilst such direct state control does assist in the ensuring high standard service for customers, a major consequence of this regulatory form was to protect the monopoly of SOEs in the sector.

After privatising and liberalising the telecommunications sector, SOEs are not the sole provider of telecommunications. As a result, the regulatory framework should move from protecting the incumbent's monopoly to enhancing competition. In this context, the state is no longer able to employ a direct control in the form of establishing SOEs as the sole provider of telecommunication (state ownership). After privatisation, the state has little choice but to employ an indirect control in the form of establishing a regulatory framework with a competitive orientation. To this end, establishing a licensing regime is essential. This enables the state to control markets by specifying the rights and obligations of operators, and provides investors with some certainty as to the business in which they are investing. The license provides all stakeholders, including consumers, competitors and the government with a clear understanding of what the operator is and is not permitted or required to do.

⁶⁴ Articles 46 and 47 of the Decree of the Ministry of Transportation No. KM 21/2001.

⁶⁵ Article 55 of the Government Regulation No. 52/2000.

⁶⁶ *Ibid.* Articles 56-7.

⁶⁷ Walden and Angel, *supra* note 1, p 153

⁶⁸ *Ibid.* pp. 153-4

What Indonesia can learn from this is that Indonesia should take a clear position regarding the state role should play after privatisation. The author suggests that the government should focus on the policy making function while the regulatory function including licensing should be transferred completely to the Telecommunications Regulatory Body (BRTI). In addition, Indonesia should consider establishing a new licensing regime that technology neutral in nature. This is to ensure that it does not go out of date when new technology is used to provide the same service. Furthermore, Indonesia should consider adopting a general authorisation or class license approach as applied in the UK, except for the use of scarce resources. This will invite more operators to be involved in the provision of telecommunications services and thereby provide more choices to consumers. More importantly, the removal of licensing procedures may substantially reduce the level of corruption in the bureaucracy.

7. Concluding Remarks

For those new to telecommunications law, licensing might initially seem merely an administrative exercise. However, as the above analysis has demonstrated, while licensing might involve the usual procedural aspects of filling out the proper forms, it is also a complex and sophisticated area of telecommunications law concerned with the structure and nature of a particular telecommunications market. Licensing can be used as a tool to implement important national priorities, be it opening the markets for equipment, services, and networks to immediate or gradual competition, or to preserve a monopoly for the time being so as to permit investors to recoup their expenditures or to continue a source of revenue for the government.

In this vein, licensing therefore becomes a crucial policy tool for governments. Interestingly, the implementation of a licensing regime for a privatised telecommunications market encourages governments to more clearly adopt a pro-active and explicit telecommunications role. And these policy and licensing roles, together, form the new method of state control.

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